UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA, Complainant,	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 98A00058
TEMPO PLASTIC COMPANY, INC., Respondent.	)	Judge Robert L. Barton, Jr.

ORDER GRANTING RESPONDENT'S MOTION TO WITHDRAW MATTERS DEEMED ADMITTED AND TO AMEND ADMISSIONS

(August 11, 1998)

I. INTRODUCTION

This Order centers around Respondent's requests (1) to withdraw admissions it was deemed to have made when it failed to respond to Complainant's request for admissions by the appropriate deadline and (2) to amend its first set of responses to Complainant's request for admissions. The main issues I must decide are:

> (1) whether allowing Respondent to withdraw the matters deemed admitted will subserve the presentation of the merits of the case;
>
> (2) whether allowing Respondent to amend its first response will subserve the presentation of the merits of the case;
>
> (3) whether Complainant has demonstrated it will be prejudiced by allowing the withdrawal of the matters deemed admitted; and
>
> (4) whether Complainant has demonstrated it will be prejudiced by allowing the amendment of Respondent's first answers to the request for admissions.

For the reasons discussed in detail below, I find that allowing Respondent to withdraw and to amend its admissions will subserve the presentation of the merits of the case and will not prejudice Complainant. As a result, I GRANT Respondent's Motion and accept its amended responses to Complainant's request for admissions.

II. BACKGROUND AND PROCEDURAL HISTORY

In my order noting default, issued May 12, 1998, I noted that Respondent had not filed an answer to the Complaint by the appropriate deadline and that Respondent risked losing this case by default if it did not file an answer. I gave Respondent until June 1, 1998, to file an answer and to explain why it did not file the answer in a timely manner. On June 1, my office received a letter, dated May 30, 1998, from Respondent's president in response to my order noting default. Some of Respondent's statements in the letter that refer to numbered fact items and the authenticity of documents did not appear to respond to the allegations of the Complaint. It became clear at the prehearing conference, held June 18, 1998, that Respondent had filed answers to Complainant's requests for admissions instead of an answer to the Complaint.

Based on the date Complainant's counsel said he served the request for admissions, it appeared that Respondent's response was late. I noted that failure to respond on time to requests for admissions results in the automatic admission of those items. I informed Respondent's president that he would have to file a motion to withdraw those admissions if he wished me to consider allowing Respondent to substitute its response dated May 30 for those admissions. Complainant's counsel subsequently provided my office with a copy of its request for admissions. The date of service noted on the certificate of service, March 25, 1998, is even five days earlier than the date Complainant's counsel mentioned during the conference.

Respondent served and filed its Motion to Withdraw Matters Deemed Admitted and to Amend Admissions on July 6, 1998. Complainant was entitled to file a response to Respondent's Motion on or before July 21, see 28 C.F.R. §§ 68.11(b); 68.8(c)(2) (1997), but it has not done so. Respondent asks that the "Request for Admissions of Fact dated March 26, 1998 from Mr. Frederick Newman be withdrawn as being automatically admitted after [its] late response dated May 30, 1998." Mot. Withdraw at 1. Respondent filed with its Motion an amended response to the request for admissions. To avoid confusion, I will refer to the letter dated May 30, 1998, as the first response, and to the response served and filed July 6, 1998, as the second response.

In the first response, Respondent admits requests one through six, and denies requests seven through nine. See First Response at 2-3. Respondent includes narrative explanations regarding the requests it denies. See id. Respondent admits both requests for the admission of authenticity of documents, with some explanation as to the first of those requests. See id. at 2. The second response differs slightly from the first response. In the second response, Respondent denies request six and slightly expands upon the narrative explanations regarding all the requests it denies. See Second Response at 1-3. Respondent still admits both requests for the admission of authenticity of documents, but amends its explanation as to the first and adds a brief explanation as to the second. See id. at 3.

III. LEGAL ANALYSIS AND DISCUSSION

A. Effect of failure to respond to request for admissions in a timely manner

The OCAHO rule regarding requests for admissions, found at 28 C.F.R. § 68.21, is very similar to Federal Rule of Civil Procedure 36, which governs requests for admissions in cases before the federal district courts. As such, Rule 36 and federal case law interpreting it may be informative in construing the provisions of 28 C.F.R. § 68.21. Cf. United States v. Aid Maintenance Co., 6 OCAHO 810, 813 (Ref. No. 893) (1996), 1996 WL 73594, at *3 (using Federal Rules of Civil Procedure provisions concerning summary judgment and federal case law regarding them as guidelines in interpreting similar OCAHO rules governing summary decision).

Requests for admissions are deemed admitted if not responded to within thirty days of service. See 28 C.F.R. § 68.21(b) (1997); see also Fed. R. Civ. P. 36(a). If the requests for admissions are served by ordinary mail, the responding party has five additional days in which to serve its answers and/or objections. See 28 C.F.R. § 68.8(c)(2) (1997). The requests automatically are deemed admitted if the party from whom the admissions are sought does not respond within the appropriate time limit. See Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir. 1995). A motion to deem the requests admitted is not necessary. See American Technology Corp. v. Mah, 174 F.R.D. 687, 690 (D. Nev. 1997) (denying a motion to deem requests for admissions admitted on the grounds that it was unnecessary, given the automatic effect of Rule 36(a)).

In the present case, Complainant served its Request for Admissions of Fact and Request for Admissions of Authenticity of Documents via regular mail on March 25, 1998. Respondent's answers and/or objections to those requests should have been served on or before April 29, 1998, but Respondent did not do so. When Respondent failed to respond to Complainant's requests for admissions in a timely manner, the matters of which Complainant sought admissions automatically were deemed admitted.

B. Standards to permit withdrawal and/or amendment of admissions

Admissions can be withdrawn and/or amended, upon motion. See 28 C.F.R. § 68.21(d) (1997) ("Any matter admitted under this section is conclusively established unless the Administrative Law Judge upon motion permits withdrawal or amendment of the admission"); see also Fed. R. Civ. P. 36(b). On June 29, 1998, Respondent filed its Motion to Withdraw Matters Deemed Admitted and to Amend Admissions.

The OCAHO Rules of Practice provide no standard for permitting the withdrawal and/or amendment of admissions made in the context of requests for admissions, but they do provide that the Federal Rules of Civil Procedure "may be used as a general guideline in any situation not provided for or controlled by [the OCAHO Rules], the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation," 28 C.F.R. § 68.1 (1997). Under the Federal Rules, the trial judge "may permit withdrawal or amendment when the presentation of the merits of

the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits." Fed. R. Civ. P. 36(b). An appellate body will review a trial court's decision to deny a motion to withdraw or to amend an admission for an abuse of discretion. See Hadley, 45 F.3d at 1348.

1. Presentation of the merits

"The first half of the test in Rule 36(b) is satisfied when upholding the admissions would practically eliminate any presentation of the merits of the case." Id. In the first response to Complainant's request for admissions, Respondent seeks to withdraw three admissions, to include a narrative explanation regarding those three items it wants to deny, and to add some explanatory words to its admission of the authenticity of an employment eligibility verification form (I-9 form). In the second response, Respondent seeks to amend its first response by changing one prior admission to a denial and by elaborating on some of its explanations of matters admitted and denied.

In Hadley, the Ninth Circuit found that allowing a party to withdraw admissions that admitted "necessary elements" of the cause of action would "facilitate a presentation of the merits" of the case. Id. Respondent denies the following items in the first response:

Request No. 7: Admit or deny that Respondent continued to employ Rene F. Perez between June 7, 1994 and May 23, 1995 knowing that Perez was an alien, without authorization to be employed in the United States.

Request No. 8: Admit or deny that on May 23, 1995 Respondent's owner Douglas Rogers informed US Border Patrol Agent Steven Borup that Respondent was trying to help Rene F. Perez legalize Perez' immigration status in the United States by filing an Application for Alien Employment Labor Certification on behalf of Perez.

Request No. 9: Admit or deny that on May 23, 1995 Respondent's owner Douglas Rogers informed US Border Patrol Agent Steven Borup that Tempo Plastic Company could not operate with Rene F. Perez' critical technical skills needed to keep plant computers and machinery operating.

Those requests deal with Respondent's knowledge of Rene F. Perez' work status. Respondent's knowledge goes to the heart of the single count of the Complaint, which alleges that Respondent hired Rene F. Perez and continued to employ him knowing that he was an alien not authorized for employment in the United States, see Compl. ¶¶ I.A-B. Therefore, permitting Respondent to withdraw its admissions of those items will subserve a presentation of the merits of the case.

In the second response, Respondent amends its first response by denying the following item that it previously had admitted:

Request No. 6: Admit or deny that Respondent filed a US Department of Labor Application for Alien Employment Labor Certification on behalf of Rene F. Perez on or about June 6, 1994.

That request likewise impacts on the issue of Respondent's knowledge of the employee's work status. Respondent's denial includes the explanation from its president that the "US Department of Labor Application for Alien Employment Labor Certification was prepared by a third party, supposedly knowledgeable in employment matters, not paid by me. I signed the application following instruction of this third party, who was retained by Rene Perez." Second Response at 1. More than a bare admission or denial, that response clarifies Respondent's precise position on the matter and would facilitate a presentation of the merits of the case.

Finally, in both the first and second responses, Respondent incorporates narrative explanations and clarifications of its exact stance when admitting and denying certain matters. Like the response to Request No. 6, those explanations elucidate Respondent's stances on the issues, and I will allow them to be made along with the underlying admissions and denials, as long as the second half of the Rule 36(b) test is met.

2. Prejudice to the opposing party

Prejudice to the party that obtained the admission means something more than merely the party now will have to prove the information.

> The prejudice contemplated by Rule 36(b) is "not simply that the party who obtained the admission will now have to convince the factfinder of its truth. Rather, it relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence" with respect to the questions previously deemed admitted.

Hadley, 45 F.3d at 1348 (quoting Brook Village N. Assocs. v. General Elec. Co., 686 F.2d 66, 70 (1st Cir. 1982)). "Courts are more likely to find prejudice when the motion for withdrawal is made in the middle of trial." Id. Additionally, the party that obtained the admission carries the burden of proving that permitting the withdrawal of the admission would prejudice its case. Id.

Complainant was entitled to file a response to Respondent's Motion on or before July 21, 1998. See 28 C.F.R. §§ 68.11(b); 68.8(c)(2) (1997). To date, Complainant has filed no response to the Motion and, consequently, has not demonstrated that it would be prejudiced either by the withdrawal of the matters deemed admitted or the amendment of Respondent's original response to the request for admissions. At any rate, it is unlikely that Complainant could have shown prejudice to its case under the standard set out by the Ninth Circuit. First, only a relatively short amount of time has elapsed since the start of this case. Not only is this not the middle of trial, but the case is in an early procedural posture. Next, it is unlikely that Complainant has relied on the admissions to its detriment at this early stage. Even if Complainant has relied on the belief that it would not

have to present evidence to prove the matters deemed admitted, that problem can be remedied by giving Complainant the opportunity to conduct further discovery. The danger is small that witnesses will have become unavailable or memories will have faded in this time period so as to make discovery useless. Specifically regarding the amendment of the original response, only one prior admission from the first response now is denied. Other very small changes have been made by adding more to the explanations of certain items. Those slight changes in the second response do not reflect major changes in Respondent's litigation position and, thus, will not prejudice Complainant.

C. Comparison with recent OCAHO precedent

I recently had another opportunity to examine the issue of when it is appropriate to allow a party to withdraw and/or amend prior admissions. See United States v. Spring & Soon Fashion Inc., 8 OCAHO 1003 (1998). In that case, I denied the request of the two respondents to withdraw admissions they had made by failing to respond to a request for admissions on time. The circumstances of Spring & Soon, however, are distinguishable from the present case.

Case law from the U.S. Court of Appeals for the Second Circuit controlled my decision in Spring & Soon, but precedent from the Ninth Circuit governs my decision in this case. Judicial review may be obtained "in the Court of Appeals for the appropriate circuit." 8 U.S.C. § 1324a(e)(8) (1994); see also 28 C.F.R. § 68.53(a)(3) (1997). Both of those circuits adhere to the standard that the trial judge possesses discretion in deciding whether to permit a party to withdraw or amend admissions. See Hadley, 45 F.3d at 1348 ("A district court's denial of a motion to withdraw or amend an admission is reviewed for an abuse of discretion"); Donovan v. Carls Drug Co., Inc., 703 F.2d 650, 651-52 (2d Cir. 1983) ("[T]he decision to excuse [a party] from its admissions is in the court's discretion"). Each one, however, takes a different view of exactly what "discretion" means in that context.

Emphasizing Rule 36(b)'s use of the word "may," the Second Circuit states that, "[b]ecause the language of the Rule is permissive, the court is not required to make an exception to Rule 36 even if both the merits and prejudice issues cut in favor of the party seeking exception to the rule." Carls Drug, 703 F.2d at 652 (emphases added). Based on that principle, in Spring & Soon I denied the respondents' request to withdraw their admissions, even assuming they could have met the two conditions of Rule 36(b), because of other extenuating circumstances surrounding the respondents' failure to answer the request for admissions on time. See Spring & Soon, 8 OCAHO 1003, at 9-11.

The Ninth Circuit, however, has held that a trial court abuses its discretion in denying a motion to withdraw deemed admissions when both conditions of Rule 36(b) are met. See Hadley, 45 F.3d at 1350. In Hadley, the district court judge had found that withdrawal of the admissions would prejudice the opposing party's case, but the circuit court ruled that the opposing party's case would not be prejudiced. See id. at 1347-49. One judge dissented, pointing to a prior Ninth Circuit case in which the Court found "there is no absolute right to withdraw an admission just because it

relates to an ultimate issue in the case." See id. at 1350 (Fernandez, J. dissenting). The dissenting judge noted that, on a prior occasion in which the parties "asserted that their admissions were a virtual concession of liability and that the other side had made no affirmative showing of prejudice," id. (Fernandez, J. dissenting), the Court said:

> What the [parties] are actually asserting is that they had an absolute right under Rule 36(b) to have the admissions withdrawn. Such a reading seems especially inappropriate when the Rule uses the discretionary term "the court may." . . . In a proper case, of course, such as when an admission has been made inadvertently, Rule 36(b) might well require the district court to permit withdrawal. But our review is limited to whether the district judge abused his discretion. On the record before us, we conclude he has not.

Id. at 1350-51 (Fernandez, J. dissenting) (quoting Asea, Inc. v. Southern Pacific Transp. Co., 669 F.2d 1242, 1248 (9th Cir. 1981)). In Asea, the Ninth Circuit also pointed out that "[a] per se rule that the district court must permit withdrawal of an admission which relates to an important or dispositive matter is inappropriate in light of the purpose of this discovery device: to narrow the issues for trial and avoid litigation of unessential facts." Asea, Inc. v. Southern Pacific Transp. Co., 669 F.2d 1242, 1248 (9th Cir. 1981).

Despite the potential tension between Asea and Hadley, I am compelled in this case to follow the approach in Hadley because it represents the Ninth Circuit's more recent statement on the issue. Unlike in the Second Circuit, it appears under Hadley that the trial judge does not have discretion to refuse a request to withdraw and/or amend admissions if letting the party do so would subserve the presentation of the merits of the case and would not prejudice the opposing party.

Even if Hadley permitted me to deny a request to withdraw and/or amend admissions despite the fact that both conditions of Rule 36(b) are satisfied, I would not do so in the present case because the circumstances of this case are otherwise distinguishable from Spring & Soon. The Spring & Soon respondents were especially alerted to the seriousness of the admissions when the complainant sought judgment based largely on those admissions. See Spring & Soon, 8 OCAHO 1003, at 10-11. In spite of that notice, the respondents still failed promptly to respond and move to withdraw their deemed admissions. See id. In fact, the respondents did not even respond to the complainant's motion for summary decision. See id. at 11. After the respondents missed the deadlines for answering the request for admission, for responding to a motion to compel discovery, and for responding to the motion for summary decision, I issued a show cause order in which I gave the respondents the opportunity to demonstrate why I should not deem each of the admissions admitted. See id. at 5-6. The respondents finally answered the request for admissions, as well as other outstanding discovery requests, in response to my show cause order, but they failed to provide all the information required in the show cause order. See id.

In the present case, Respondent stated in its first response, which it erroneously thought was its Answer to the Complaint, that financial burdens and business exigencies caused its late filing. See First Response at 1. While Respondent could not use that excuse as a tool repeatedly to frustrate the progress of this case, I have no reason to believe that the stated reason is less than genuine. Confusion on Respondent's part also appears to have been a factor in Respondent's delay. When I issued the notice of default, I was giving Respondent an opportunity to answer the Complaint, but Respondent mistakenly responded with answers to the requests for admissions. If Respondent was confused over the difference between an answer to a complaint and an answer to requests for admissions, then it almost certainly did not understand the consequences of failing to respond to either in a timely manner. Respondent's behavior has not exhibited the flagrant disregard of the rules that existed in Spring & Soon. Denying Respondent relief from its admissions, even though the responses were served late, would not be warranted under the circumstances.

Additionally, "[c]ourts have concluded there are situations in which it would not 'further the interests of justice' to 'deem a central fact to have been admitted by the failure of [a] pro se defendant to respond' to requests for admissions." Spring & Soon, 8 OCAHO 1003, at 11 (quoting Local Union No. 38, Sheet Metal Workers' Int'l Ass'n, AFL-CIO v. Tripodi, 913 F. Supp. 290, 294 (S.D.N.Y. 1996)). Although that scenario did not match the facts of Spring & Soon, in which the respondents were represented by legal counsel, see id., it does fit the facts of the case before me now, in which Tempo Plastic is appearing pro se. Given all the circumstances, I conclude that refusing to allow this pro se Respondent to withdraw and to amend its admissions would not advance the interests of justice.

IV. CONCLUSION

Based on the foregoing, I find that allowing Respondent to withdraw the admissions it was deemed to have made when it failed to respond to Complainant's requests for admissions on time will subserve the presentation of the merits of the case and will not prejudice Complainant. I also find that allowing Respondent to amend its first response to Complainant's requests will subserve the presentation of the merits of the case and will not prejudice Complainant. I GRANT Respondent's Motion to Withdraw Matters Deemed Admitted and to Amend Admissions. Therefore, Respondent's second response, which was served and filed July 6, 1998, and amends the first response, is accepted as the current response to Complainant's requests for admissions.

Although the circumstances warrant accepting Respondent's late response in this instance, I remind Respondent of its obligation to comply with the OCAHO Rules of Practice and Procedure, found in the Code of Federal Regulations at 28 C.F.R. Part 68. A copy of those Rules was sent to Respondent in the packet that contained the Complaint and the Notice of Hearing. All parties are required to follow the Rules of Practice and Procedure, even if they appear without an attorney. Also, if Respondent in the future has procedural questions, including questions about applicable deadlines, it should telephone my law clerk, Laura Conner, at (703) 305-1739.

Not later than August 31, 1998, Complainant and Respondent shall file a pleading proposing a procedural schedule for the remainder of this case. "File" means that the document must be received in my office by the given date, not that it merely must be postmarked by then. 28 C.F.R. § 68.8(b) (1997). The proposed procedural schedule shall include dates for completing discovery, if additional discovery is needed; for filing motions, stipulations, exhibit and witness lists, including summaries of proposed testimony of witnesses; for exchanging exhibits; and for conducting the hearing. The parties should attempt to submit a joint pleading signed by both parties agreeing on dates for the proposed procedural schedule. Complainant is ordered to attempt to contact Respondent to formulate an agreed upon schedule. However, if the parties cannot agree, they shall file separate proposals.

All requests for relief, including requests for extension of time, shall be submitted in the form of a written motion, not a letter. A party shall not move for an extension of time unless the movant has conferred or attempted to confer with the opposing party to secure that party's agreement on the extension. If the non-moving party does not object to the extension, the motion shall so indicate. If the movant has attempted to confer, but has been unable to reach the opposing party or to secure the opposing party's agreement to the extension, the motion shall so indicate by relating the steps the movant took to communicate with the opposing party. Further, the motion for an extension of time shall be filed prior to the due date.

An original and two (2) copies of all pleadings, including attachments, shall be filed with this office. 28 C.F.R. § 68.6(a) (1997). All documents filed with this office, including but not limited to motions, other pleadings and memoranda, shall have numbered pages. The parties shall not file with the Judge any documents produced during discovery unless the documents are related to a pending motion or upon the order of the Administrative Law Judge. Id. § 68.6(b).

If the parties settle this case, Complainant shall be responsible for submitting a written notice or motion pursuant to the requirements of 28 C.F.R. § 68.14 (1997).

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE